UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 99-5526 and 99-5628

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NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

MAIN STREET TERRACE CARE CENTER

Respondent/Cross-Petitioner

_____

ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION
FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce, and the cross-petition of Main Street Terrace Care Center ("the Company") to review, a Board order issued against the Company on January 29, 1999. The Board's Decision and Order are reported at 327 NLRB No. 101. (D&O 1-7, A 28-34.)[1]

[1] "D&O" and "ALJD" refer to the Board's Decision and Order and to the administrative law judge's decision, respectively. "Tr" refers to the transcript of the hearing before the administrative law judge, "GCX" refers to the exhibits offered at the hearing by the Board's General Counsel, and "CX" refers

The Board had jurisdiction over this case under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. No commerce issue is presented here. The Board's order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Lancaster, Ohio. The Board filed its application for enforcement on April 21, 1999, and the Company filed its cross-petition for review on May 11, 1999. The application and cross-petition were timely filed; the Act places no time limit on such filings.

STATEMENT OF THE ISSUES

I. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from discussing their wages among themselves.

II. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section

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to those offered by the Company. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

8(a)(1) of the Act by discharging employee Mary Craig because she engaged in protected concerted activity.

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by Mary Craig, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by promulgating a rule prohibiting employees from discussing their wages among themselves, and by discharging employee Mary Craig for engaging in protected concerted activity. (Complaint ¶¶ 4, 6, and 7, A 50-51.) Following a hearing, an administrative law judge ("the ALJ") found that the Company violated the Act as alleged. (ALJD 6, A 33.) On January 29, 1999, the Board (Chairman Truesdale and Members Fox and Hurtgen) issued its Decision and Order, affirming the ALJ's findings and conclusions. (D&O 1, A 28.) This case is now before this Court on the Board's application to enforce, and the Company's cross-petition to review, the Board's order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company operates a nursing home for the elderly in Lancaster, Ohio. (ALJD 1, A 28; Complaint ¶ 2(a), A 49, Answer ¶ 2, A 59.) Lisa Cochran has been the administrator of the home since about March 1997. She oversees the operation of the home

and supervises the Company's several department heads. (ALJD 3 & n.7, A 30; Tr 114-115, A 209-210 (Cochran).) This case concerns a series of events in the dietary department.

Margie Keister was the manager of the dietary department until January 1997, when she became a dietary aide in the kitchen. At that time, the Company hired Mary Ann Jeffers to manage the dietary department. (ALJD 2, A 29; Tr 10, A 105 (Jeffers), Tr 37, A 132 (M. Craig).) Among other things, Jeffers is responsible for hiring, firing, and supervising employees, and informing employees of changes in their pay. (ALJD 2, A 29; Tr 11, 28, A 106, 123 (Jeffers).) The remaining staff in the dietary department consists of three to four dietary aides, and cooks. Dietary aides prepare residents' drinks and help to serve meals to the residents. Cooks prepare the residents' meals. (ALJD 2, A 29; Tr 34, A 129 (M. Craig), GCX 2, A 62.)

B. The Company's Dietary Managers Tell Mary Craig and April Craig Not to Discuss Their Wages with Other Employees

In June 1996, then-Dietary Manager Keister hired employee Mary Craig as a dietary aide. (ALJD 1, A 28; Tr 33-34, A 128-129 (M. Craig).) Keister informed Mary Craig of her wage rate and warned Craig not to disclose how much money she was making, explaining that "the management did not want it known" that some

employees earned more than others for the same work. (ALJD 1-2, A 28-29; Tr 36, A 131 (M. Craig).)

In March 1997, Dietary Manager Jeffers hired April Craig, Mary Craig's daughter, as a dietary aide. (ALJD 2, A 29; Tr 37, A 132 (M. Craig), Tr 96, A 191 (A. Craig).) Jeffers told April Craig not to discuss her paycheck with anyone. (ALJD 2, A 29; Tr 96-97, A 191-192 (A. Craig).) Jeffers conceded that she tells employees to keep their wage rates confidential because the "owner of the facility" does want employees discussing their wages. (ALJD 2, A 29; Tr 28, A 123 (Jeffers).)

C. Mary Craig Assists Employees April Craig, Joyce Rigby, and Tracy Jackson with Wage-Related Problems

Shortly after April Craig began working for the Company, she noticed that the Company was sometimes not paying her appropriately, and sometimes not paying her at all, for overtime shifts. (ALJD 2, A 29; Tr 38, A 133 (M. Craig).) April Craig asked Mary Craig to talk to Dietary Manager Jeffers about those underpayments, which Mary Craig did on several occasions. (ALJD 2, A 29; Tr 28-29, A 123-124 (Jeffers), Tr 38-39, A 133-134 (M. Craig).) Mary Craig also discussed those shortages with Tracy Wentz, the Company's payroll clerk. (ALJD 2, A 29; Tr 38-39, A 133-134 (M. Craig.) Mary Craig reported the results of these discussions to April Craig. (Tr 112, A 207 (A. Craig).)

April Craig sometimes accompanied her mother to discuss the shortages in her paychecks with Jeffers. April Craig also went alone to see Jeffers about those underpayments. (ALJD 2, A 29; Tr 38, A 133 (M. Craig), Tr 112, A 207 (A. Craig).) On one of the latter occasions, Jeffers told April Craig that she "needed to come to her by [her]self" to resolve matters concerning her pay. (ALJD 2, A 29; Tr 98, A 193 (A. Craig).)

Around the same time, employee Joyce Rigby complained to Mary Craig that Dietary Manager Jeffers had cut Rigby's pay. (ALJD 2, A 29; Tr 39-40, A 134-135 (M. Craig).) Rigby worked as both a cook and an aide, earning a higher wage rate as a cook. The Company planned to eliminate Rigby's dual wage rates in favor of a uniform rate that, on balance, meant Rigby would earn less total income. Rigby told Mary Craig that she was unhappy about this change, but was afraid to say anything for fear of losing her job. (ALJD 2, A 29; Tr 39-41, A 134-136 (M. Craig).)

Mary Craig encouraged Rigby to object to the change and informed her that April Craig earned dual wage rates for working as a cook and a dietary aide. Mary Craig also offered to talk to Jeffers on Rigby's behalf and did so, telling Jeffers that it was wrong to reduce Rigby's pay. Mary Craig's efforts failed, but Rigby later secured reinstatement of her dual wage rates, and thanked Craig for her assistance. (ALJD 2, A 29; Tr 39-41, A 134-136 (M. Craig).)

In September 1997, Dietary Manager Jeffers told employees Mary Craig and Tracy Jackson that the Company was giving each of them a wage increase. Jeffers told them not to mention the increases to other employees in the kitchen because those employees were not receiving increases. Craig and Jackson discussed the likely amount of their raises and Jeffers's directive not to tell anyone about those raises. They then went to Jeffers together and asked about the amount of the increases; Jeffers answered that they would each receive about 50 cents more per hour. (ALJD 2, A 29; Tr 43-44, A 138-139 (M. Craig).)

D. Dietary Manager Jeffers Gives Mary Craig an Outstanding Evaluation and Recommends Her Continued Employment; Craig Is Voted Employee of the Month

In October 1997, Dietary Manager Jeffers completed an annual evaluation of Mary Craig.[2] Jeffers graded Craig "Outstanding" in terms of her "Personality," "Initiative," "Self Improvement," and "Dependability," and "Above Average" in the categories of "Cooperation," "Quality of Work," and "Quantity of Work." Overall, Jeffers rated Craig "Outstanding" and recommended her continued employment. Jeffers added in her own words that Craig

[2] The evaluation form, (GCX 5, A 64), is dated July 14, 1997, which is when Mary Craig should have received her annual evaluation. Jeffers backdated the evaluation, apparently because she did not have time to complete the form at the appropriate time. (ALJD 2, A 29; Tr 23, A 118 (Jeffers).)

"is very dependable, very cooperative and a very hard worker!" (ALJD 2, A 29; Tr 22-23, A 117-118 (Jeffers), GCX 5, A 64).)

Also in October 1997, the employees at the nursing home voted Mary Craig "Employee of the Month." In recognition of this award, the Company gave Craig a certificate, a monetary award, and placed her name on a plaque at the home. (ALJD 2, A 29; Tr 23-26, A 118-121 (Jeffers), GCX 6, A 65.)

E. The Company Gives Mary Craig Part of Her Promised Wage Increase and Assures Her that the Rest Will Be Forthcoming; At a Meeting in Cochran's Office, Craig Expresses Employees' Concerns about a New Dietary Aide

By the end of October, neither Mary Craig nor Jackson had received the 50 cents per hour wage increase they had been promised in September, and they began to share their concerns with one another over the delay. Beginning with the pay period November 1 to November 15, 1997, Craig received only a 25 cents per hour increase and Jackson still did not receive a raise at all. (ALJD 2, A 29; Tr 44-45, A 139-140 (M. Craig), GCX 14, A 92.) Craig complained to Jeffers about that, saying, "you promised us a raise and we didn't get it." Jeffers explained that there had been a payroll error and that the promised raises would be forthcoming. (ALJD 2, A 29; Tr 45-46, A 140-141 (M. Craig).)

On November 11, 1997, Administrator Cochran held a meeting in her office with Dietary Manager Jeffers and the entire

dietary staff, with the exception of Margie Keister. Cochran wanted to discuss why people in the kitchen were not getting along with one another. Cochran encouraged the group to speak candidly. She then asked each person directly to identify any problems he or she saw in the kitchen. (ALJD 3, A 30; Tr 46-49, A 141-144 (M. Craig), Tr 101-103, A 196-198 (A. Craig).)

Mary Craig answered that Bob Monson, a new dietary aide, was causing difficulties in the kitchen. Specifically, Mary Craig said that Monson was rude to the nurses' aides, that he ignored their requests for assistance, and that he generally made it more difficult for Craig to do her job. (ALJD 3, A 30; Tr 46-47, A 141-142 (M. Craig), Tr 101-103, A 196-198 (A. Craig), Tr 128, A 223 (Cochran).) Cochran responded by asking Craig, "If you can't get along with anybody, why are you here?" Mary Craig expressed disbelief at Cochran's question, said, "end of meeting," and walked out of Cochran's office. No one from the Company talked to Craig afterwards about getting along with Monson, improving her attitude, or leaving the meeting. (ALJD 3, A 30; Tr 49-50, A 144-145 (M. Craig).) Cochran, however, did discuss with Jeffers Monson's inability to get along with other employees. (Tr 128, A 223 (Cochran).)

Although no one else spoke out at the meeting concerning Monson, several dietary employees, including April Craig and Rigby, had experienced problems working with Monson. In fact,

according to April Craig, Monson was "rude" to her and others, "when the nurses aides would . . . ask him to get something and he would tell them whenever he got the time," and he would "sit at the [residents'] table while the residents were coming in to eat, and he wouldn't move." (ALJD 3, A 30; Tr 100, A 195.) Rigby too "didn't get along" with Monson, in part because he had a "good habit" of talking about people behind their backs. (ALJD 3, A 30; Tr 94, A 189 (Rigby).)

F. Dietary Manager Jeffers Threatens to Fire Mary Craig for "Making Trouble" in the Kitchen

April Craig resigned from her position with the Company in November, though the last day she worked was Wednesday, December 10, 1997. At April's request, Mary Craig went with her husband to the nursing home that evening to retrieve April Craig's cigarette case. (ALJD 3, A 30; Tr 59-60, A 154-155 (M. Craig), Tr 104-105, A 199-200 (A. Craig).) Upon entering the home, Mary Craig overheard employee Monson telling Dietary Manager Jeffers that April Craig had been spreading lies about him and not doing her job. Mary Craig heard Jeffers agree with Monson, and begin to criticize Mary Craig, as well. Craig confronted them and asked Jeffers how she could say things she knew were untrue. Mary Craig then went to find her daughter's cigarette case. (ALJD 3, A 30; Tr 60-61, A 155-156 (M. Craig).)

Before leaving the home, Mary Craig told Jeffers that she was being unfair to her. Jeffers disagreed and said that she was going to fire whoever was "making trouble" in the kitchen. Mary Craig responded that Jeffers had no reason to fire her, and that Jeffers had better not do so without a good reason because Craig would sue Jeffers. Craig then turned to leave the home because she heard her husband honking the car horn. Jeffers hollered at her to come back, but Craig said that she had to leave, and she did. (ALJD 3, A 30; Tr 62-63, A 157-158 (M. Craig).)

G. Mary Craig Advises a Nurse to File a Grievance; The Director of Nursing Overhears Craig Discussing the Potential Benefits of a Union with Another Employee

The next day, December 11, as Mary Craig was working in the kitchen, a nurse, named Paula, told Craig that she was upset because the Company had wrongfully denied her a promotion.[3] Mary Craig encouraged Paula to file a grievance with the Director of Nursing. Employee Monson was standing behind Craig when she made this suggestion. (ALJD 3, A 30; Tr 55-57, A 150-152 (M. Craig).)

That same day, nursing aide Donna McKenzie complained to Mary Craig about the way she, McKenzie, was being treated by the Company. McKenzie brought up the subject of unionization by saying, "[w]ell, if we had a union," at which point Craig interjected that, "[i]f we had a union they would not treat any of us this way." Craig spoke loudly enough for those standing at a nearby nurses station to hear her statement. The Director of Nursing was at that station and looked up following Craig's statement. (ALJD 3, 5, A 30, 32; Tr 55, 57-58, A 150, 152-153 (M. Craig).)

H. Administrator Cochran Discharges Mary Craig and Refuses Her Repeated Requests for an Explanation

[3] Mary Craig was unable to recall Paula's last name, which does not appear anywhere else in the record. (ALJD 3, A 30; Tr 56, A 151 (M. Craig).)

When Mary Craig arrived at work on Monday, December 15, she felt ill and informed Dietary Manager Jeffers that she could not work that day. Jeffers told Craig to follow her to Cochran's office. (ALJD 4, A 31; Tr 63-64, A 158-159 (M. Craig).) Once

they were inside Cochran's office, Cochran told Mary Craig that her employment was terminated. Craig repeatedly asked Cochran for an explanation but Cochran refused to give a reason, saying only, "I don't have to tell you. I don't have to have a reason." (ALJD 4, A 31; Tr 65, A 160 (M. Craig).) Cochran discharged Mary Craig, notwithstanding that the Company's handbook, (GCX 8, A 66), contemplated progressive discipline and that Craig had never received any written warnings or any other indication that her attitude or performance was unsatisfactory. (ALJD 4, A 31; Tr 130-132, A 225-227 (Cochran).)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Truesdale and Members Fox and Hurtgen) found, in agreement with the ALJ, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by promulgating a rule prohibiting employees from discussing their wages among themselves, and by discharging employee Mary Craig because she engaged in protected concerted activity. (D&O 1, 6, A 28, 33.)

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires the Company to offer employee Mary Craig full

reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority rights or any other rights or privileges previously enjoyed; to make her whole; and to expunge from its records any reference to her discharge. The Board's order also directs the Company to post a remedial notice. (D&O 1, 6-7, A 28, 33-34.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from discussing their wages among themselves. It is settled that employees have a protected right under Section 7 of the Act to discuss wage-related matters. Consequently, a rule purporting to ban such discussions is unlawful, even if not enforced.

The Company's dietary managers repeatedly told employees that they were not allowed to discuss their wages or paychecks with their coworkers. Dietary Managers Keister and Jeffers each told employees that they were not allowed to discuss their wages with one another. Indeed, Jeffers admitted that she tells employees to keep changes in their wages confidential because the Company does not want employees discussing their earnings.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging

employee Mary Craig for engaging in protected concerted activity. The evidence makes clear that Craig spoke to the Company on behalf of others in matters concerning wages and other conditions of employment, encouraged an employee to file a grievance challenging a promotion, and openly discussed the potential benefits of unionization with another employee. Thus, she engaged in protected concerted activity. The Company was aware of that activity and discharged her for having engaged in that activity. The Company's claim that it discharged, or in any event would have discharged, Mary Craig because she did not get along with a coworker and was disruptive lacks merit.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING A RULE PROHIBITING EMPLOYEES FROM DISCUSSING THEIR WAGES WITH ONE ANOTHER

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right "to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." These rights are secured by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), making it an unfair labor practice for "an employer to interfere with, restrain, or

coerce employees in the exercise of the rights guaranteed in section 7." Kentucky General, Inc. v. NLRB, 177 F.3d 430, 435 (6th Cir. 1999).

The right of employees to engage in concerted activity encompasses the right to communicate with one another regarding legitimate employee concerns, such as their terms and conditions of employment and grievances. Beth Israel Hospital v. NLRB, 437 U.S. 483, 491 (1978); Eastex, Inc. v. NLRB, 437 U.S. 556, 564-566 (1978); NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 445 (6th Cir. 1981) (protests of wages, hours, and working conditions and the presentation of job-related grievances are protected). "Freedom of communication" is vital to employees' exercise of their Section 7 rights because union and other protected activity to improve working conditions depends substantially on employees'
ability to learn about the benefits of this activity from others. Central Hardware Co. v. NLRB, 407 U.S. 539, 542-543 (1972); K Mart Corp., 297 NLRB 80, 83 (1989).

Accordingly, as the Company concedes, (Br 10), an employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting employees from discussing their wages with one another. See Franklin Iron & Metal Corp. v. NLRB, 83 F.3d 156, 158 (6th Cir. 1996) (enforcing Board finding that employer violated the Act by prohibiting wage discussions); accord

Automatic Screw Products Co., 306 NLRB 1072, 1072 (1992), enforced mem., 977 F.2d 582 (6th Cir. 1992). Moreover, a prohibition on wage discussions is unlawful, even absent evidence of enforcement, due to its natural tendency to chill employees' exercise of their statutory rights. See Franklin Iron & Metal Corp., 315 NLRB 819, 820 (1994), enforced, 83 F.3d 156 (6th Cir. 1996); accord NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 67 (2d Cir. 1992); Waco, Inc., 273 NLRB 746, 747-748 (1984).

In reviewing the Board's finding that an employer has so violated the Act, a court must accept the Board's factual findings if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); NLRB v. Talsol Corp., 155 F.3d 785, 793 (6th Cir. 1998). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Talsol Corp., 155 F.3d at 793. Under this limited standard of review, a court may not displace the Board's choice between fairly conflicting views of the evidence, even if the court might justifiably have made a different choice had the matter been before it in the first instance. Universal Camera, 340 U.S. at 488; Talsol Corp., 155 F.3d at 793; Ajax Paving Industries, Inc. v. NLRB, 713 F.2d 1214, 1217 (6th Cir. 1983).

Furthermore, with respect to the Board's credibility determinations, this Court has consistently held that it will defer to the judgment of the Board. See Kentucky General, Inc. v. NLRB, 177 F.3d 430, 435 (6th Cir. 1999); NLRB v. Baja's Place, 733 F.2d 416, 421 (6th Cir. 1984) (court normally will not disturb credibility findings made by an administrative law judge "who has observed the demeanor of the witnesses"). Thus, this Court must accept the Board's credibility findings, "unless it is clear that there is no rational basis for them." NLRB v. Valley Plaza, Inc., 715 F.2d 237, 242 (6th Cir. 1983).

B. Substantial Evidence Supports the Board's Finding that the Company Promulgated an Unlawful Rule Prohibiting Wage Discussions

As we now show, unrefuted, credited testimony supports the Board's finding that the Company promulgated an unlawful rule prohibiting employees from discussing their wages with one another. As the ALJ observed, "[t]wo different dietary managers told employees about this rule." (ALJD 5, A 32.) Dietary Manager Jeffers conceded that she told employees not to discuss their wages because "the owner of the facility did not want everyone talking about how much money they were making." (ALJD 2, 4, A 29, 31; Tr 28, A 123 (Jeffers).) Indeed, April Craig's credited testimony, (ALJD 5, A 32; Tr 97, A 192), was that Jeffers told her that employees "were not allowed to discuss [their] paychecks with anyone." The ALJ also specifically

credited, (ALJD 4, A 31), Mary Craig's testimony, (Tr 36, A 131), that Dietary Manager Keister warned her not to divulge her wage rate to others because "the management did not want it known" that some employees made more money than others for the same work.

Based on the foregoing evidence, the Board was fully justified in finding, (ALJD 5, A 32), that the Company, through its dietary managers, announced a rule prohibiting employees from discussing their wages among themselves. Therefore, the Board reasonably concluded, (ALJD 6, A 33), that the Company violated Section 8(a)(1) of the Act as alleged. See Franklin Iron & Metal Corp. v. NLRB, 83 F.3d 156, 158 (6th Cir. 1996) (enforcing Board finding that employer unlawfully prohibited wage discussions)

C. The Company's Arguments to the Contrary Lack Merit

The Company argues, (Br 11), that a rule barring wage discussions is unlawful only if it is a "written or otherwise stated" policy of the employer. On the contrary, courts and the Board have not hesitated to find violations where, as here, individual supervisors orally admonished employees not to reveal their wages to their coworkers. See, e.g., Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1511 (8th Cir. 1993) (violation found where warehouse manager orally warned employees not to discuss their

wages or open their paychecks in the warehouse); Waco, Inc., 273 NLRB 746, 747-748 (1984) (violation found where fabrication department manager and other supervisors told employees not to discuss their wages among themselves).

The Company's related contention, (Br 11, 12), that Dietary Manager Jeffers did not have the authority to promulgate a rule prohibiting wage discussions, is equally unavailing. To begin, Jeffers did not formulate the rule herself. Rather, she testified that she informed employees that "the owner of the facility did not want everyone talking about how much money they were making." (Tr 28, A 123) (emphasis added). Notably, Dietary Manager Keister also attributed the rule to the Company, telling Mary Craig that "the management did not want it known" that some employees earned more money than others for the same work. (ALJD 4, A 31; Tr 36, A 131 (M. Craig)) (emphasis added). That evidence makes clear that Jeffers was conveying a company policy, as opposed to issuing a directive of her own.

In any event, the Company's argument fails even if Jeffers formulated the rule barring wage discussions. The General Counsel alleged, (Complaint ¶ 3, A 50), and the Company admitted, (Answer ¶ 3, A 59), that Jeffers is both a supervisor, within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)), and an agent of the Company. Consequently, the Company cannot argue now that Jeffers lacked the actual or

apparent authority to tell employees that they were not allowed to discuss their wages, particularly because Jeffers was responsible for hiring employees and informing them of changes in their wages. (Tr 11, 28, A 106, 123.) See Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1511 (8th Cir. 1993) (rejecting claim that stipulated supervisor did not have authority to prohibit employees from discussing their wages with one another).

Finally, the Company argues, (Br 12-13), that the Board should have found that the Company did not have a policy prohibiting wage discussions because employees discussed their wages without, according to the Company, being disciplined. The nonenforcement of a rule, however, does not establish its nonexistence. See Franklin Iron & Metal Corp., 315 NLRB 319, 320 (1994) (testimony that no employee had been disciplined for discussing wages did not prove nonexistence of rule against such discussions), enforced, 83 F.3d 156 (6th Cir. 1996). Indeed, whatever slight evidentiary weight one might place on the Company's alleged nonenforcement of its rule is far outweighed by the Board's undisputed finding, (ALJD 5, A 32), that "[t]wo different dietary managers told employees about this rule." See Franklin Iron & Metal, 315 NLRB at 320 (two employees' credited testimony that supervisors told them "that there was to be no

discussion of wages" supported finding of unlawful rule, notwithstanding claim of nonenforcement).[4]

[4] The Company does not argue in its opening brief that the alleged nonenforcement of its rule prohibiting wage discussions absolves the Company of liability under the Act. Therefore, that argument is waived. Thaddeus-X v. Blatter, 175 F.3d 378, 403 (6th Cir. 1999). In any event, it is an argument without merit. See NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 67 (2d Cir. 1992); Franklin Iron & Metal Corp., 315 NLRB 819, 820 (1994), enforced, 83 F.3d 156 (6th Cir. 1996).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE MARY CRAIG BECAUSE SHE ENGAGED IN PROTECTED CONCERTED ACTIVITY

A. Applicable Principles and Standard of Review

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) protects an employee's right to engage in concerted activity by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Accordingly, an employer violates Section 8(a)(1) of the Act by discharging an employee for engaging in concerted activity protected by the Act. See, e.g., Arrow Elec. Co. v. NLRB, 155 F.3d 762, 767 (6th Cir. 1998) (employer violated Section 8(a)(1) by discharging employees who staged walkout to protest supervisor's belligerent behavior). The broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must "speak for themselves as best they [can]." NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962); accord Compuware Corp. v. NLRB, 134 F.3d 1285, 1288 (6th Cir.), cert. denied, __ U.S. __, 118 S. Ct. 1805 (1998).

The Supreme Court has indicated that the phrase "mutual aid or protection," set forth in Section 7 of the Act (29 U.S.C. § 157), should be construed liberally to embrace activities directed at a broad range of employee concerns. Eastex, Inc. v.

NLRB, 437 U.S. 556, 563-568, 567 n.17 (1978). Thus, employee activities are protected if they "can reasonably be seen as affecting the [employees'] terms or conditions of employment." Gatliff Coal Co. v. NLRB, 953 F.2d 247, 251 (6th Cir. 1992); accord NLRB v. Leslie Metal Arts Co., 509 F.2d 811, 813 (6th Cir. 1975) (activities are protected if they "in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute'").

For employee activity to be concerted, the Act does not require that "employees combine with one another in any particular way," or that employees formally become a group or designate a spokesperson. NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 835 (1984); accord NLRB v. Talsol Corp., 155 F.3d 785, 796 (6th Cir. 1998). It is sufficient that employee activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Meyers Industries, Inc., 268 NLRB 493, 497 (1984) (Meyers I), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), on remand, Meyers Industries, Inc., 281 NLRB 882 (1986) (Meyers II), aff'd sub nom., Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988); accord NLRB v. Talsol Corp., 155 F.3d 785, 796 (6th Cir. 1998).

Thus, it is settled that even individual activity may be concerted if it is undertaken on behalf of other employees or at

least with the object of inducing or preparing for group action. See NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 831 (1984); Compuware Corp. v. NLRB, 134 F.3d 1285, 1288 (6th Cir.), cert. denied, __ U.S. __, 118 S. Ct. 1805 (1998). Indeed, the Board, with court approval, has inferred a concerted objective where a single employee expresses dissatisfaction with working conditions to an employer during a group meeting. See, e.g., NLRB v. Talsol Corp., 155 F.3d 785, 796-797 (6th Cir. 1998) (employee's safety complaints were concerted where made in a group safety meeting); Rockwell Int'l Corp. v. NLRB, 814 F.2d 1530, 1534-1535 (11th Cir. 1987) (employee's objection in group meeting to employer's assertion that employees played radios too loudly was concerted, despite absence of prior discussion).

Moreover, concerted activities encompass those activities that precede or arise out of collective action. Thus, "'[t]he guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.'" Whittaker Corp., 289 NLRB 933, 933 (1988) (quoting Root-Carlin, Inc., 92 NLRB 1313, 1314 (1951)). Likewise, Section 7 protects individual conduct that has its origin in concerted activity. See, e.g., Dayton Typographical Service, Inc. v. NLRB, 778 F.2d 1188, 1191-1192 (6th Cir. 1985) (employee's complaints about unpaid overtime

"arose out of" and continued collective activity that began with meeting of four employees); JMC Transport, Inc. v. NLRB, 776 F.2d 612, 617 (6th Cir. 1985) (individual employee's protest was concerted where it "grew out of an earlier concerted complaint").

Whether a discharge violates Section 8(a)(1) of the Act depends on the employer's motive. In NLRB v. Transportation Management Corp., 462 U.S. 393, 400-403 (1983), the Supreme Court approved the test for determining unlawful motivation first articulated by the Board in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Under that test, a violation of the Act is established where the General Counsel shows that an employer's opposition to protected activity was a motivating factor in its decision to take adverse action against an employee. The Board's conclusion that the adverse action was unlawful must be affirmed, unless the employer proves, as an affirmative defense, that it would have discharged the employee even in the absence of his protected activity. Transportation Management, 462 U.S. at 400-403; Arrow Electric Co. v. NLRB, 155 F.3d 762, 766 & n.5 (6th Cir. 1998).

Determining whether employee activity is protected and concerted within the meaning of Section 7 of the Act is a task

that "implicates [the Board's] expertise in labor relations" and is for "the Board to perform in the first instance." NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 829 (1984). Thus, a court must defer to the Board's conclusion that an employee engaged in protected concerted activity if it is reasonably defensible. Id.; Dayton Typographical Service, Inc. v. NLRB, 778 F.2d 1188, 1191 (6th Cir. 1985).

The question of an employer's motivation for discharging an employee is a factual matter to be determined primarily by the Board. NLRB v. AT&T Mfg. Co., 738 F.2d 148, 149 (6th Cir. 1984). The Board may rely on both direct and circumstantial evidence. NLRB v. Link-Belt Co., 311 U.S. 584, 602 (1941); Birch Run Welding & Fabricating, Inc. v. NLRB, 761 F.2d 1175, 1179 (6th Cir. 1985). Or, given the reality that an employer rarely admits that it discharged an employee for engaging in protected activity, the Board may rely on circumstantial evidence alone to support a finding of unlawful motive. Gatliff Coal Co. v. NLRB, 953 F.2d 247, 251 (6th Cir. 1992); NLRB v. Aquatech, Inc., 926 F.2d 538, 545 (6th Cir. 1991). In either case, a court must accept the Board's findings regarding motive if supported by substantial evidence on the record as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Birch Run Welding & Fabricating, Inc. v. NLRB, 761 F.2d 1175, 1179 (6th Cir. 1985). A court must also accept the Board's

credibility determinations, "unless it is clear that there is no rational basis for them." NLRB v. Valley Plaza, Inc., 715 F.2d 237, 242 (6th Cir. 1983).

B. The Company Discharged Mary Craig Because She Engaged in Protected Concerted Activity

1. This Court should summarily affirm the Board's findings that Mary Craig engaged in protected concerted activity with respect to employees April Craig, Rigby, and Jackson, and that the Company knew of that activity

The Board determined, (ALJD 5, A 32), that Mary Craig engaged in protected concerted activity with respect to employees April Craig, Rigby, and Jackson, and that the Company knew of that activity. Thus, as shown, Mary Craig's protected concerted activity included dealing with the Company on April Craig's behalf to correct shortages in her paychecks, (ALJD 2, A 29; Tr 28-29, A 123-124 (M. Craig)), confronting Dietary Manager Jeffers on Rigby's behalf about the Company's intention to cut Rigby's earnings, (ALJD 2, A 29; Tr 39-41, A 134-136 (M. Craig)), and, in November 1997, communicating Jackson's and her own concerns about the delay and the amount of the wage increases promised to them by Jeffers the previous September. (ALJD 2, A 29; Tr 43-46, A 138-141 (M. Craig).) The Company does not contest these findings in its opening brief. Consequently, this Court should summarily affirm these findings. See NLRB v. Taylor Machine Products, Inc., 136 F.3d 507, 514

(6th Cir. 1998); NLRB v. Kentucky May Coal Co., 89 F.3d 1235, 1241 (6th Cir. 1996) (employer who fails to contest findings regarding 8(a)(1) violations effectively abandons right to object to those findings and admits the truth of those findings).[5]

2. The Board reasonably determined that Mary Craig engaged in protected concerted activity with respect to employee McKenzie

This Court should also affirm the Board's determination, (ALJD 5, A 32), that Mary Craig engaged in protected concerted activity with respect to employee McKenzie. Craig's conversation with McKenzie regarding her poor treatment by the Company and the likely impact of unionization on the Company's treatment of its employees was clearly protected by the Act. See NLRB v. Leslie Metal Arts Co., 509 F.2d 811, 813 (6th Cir. 1975) (activities are protected if they "in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute'").

That conversation was concerted because it involved two or more employees, and because discussion of the likely benefits of unionization is plainly an "'indispensable preliminary step to employee self-organization.'" Whittaker Corp., 289 NLRB 933, 933 (1988) (quoting Root-Carlin, Inc., 92 NLRB 1313, 1314

[5] Having failed to contest these findings in its opening brief, the Company is now precluded from doing so. See Thaddeus-X v. Blatter, 175 F.3d 378, 403 (6th Cir. 1999) (arguments not raised in an opening brief are waived).

(1951)). Moreover, Craig's statement--"[i]f we had a union they would not treat any of us this way," (ALJD 3, A 30; Tr 57-58, A 152-153 (M. Craig)) (emphasis added)--reveals that she was not merely advocating her own personal interests. See Gold Coast Restaurant Corp. v. NLRB, 995 F.2d 257, 264 (D.C. Cir. 1993) (employee's use of the term "we" in expressing dissatisfaction with a wage underpayment supported finding that employee was speaking on behalf of his coworkers).

The Company argues, (Br 18-19), however, that Craig's statement concerning unionization was not protected concerted activity because it was "the product of a purely personal dispute." In fact, as shown, Craig's statement was prompted by employee McKenzie's expression of dissatisfaction with her treatment by the Company and her mention of a union. Indeed, Craig's statement was a direct and immediate outgrowth of her discussion with McKenzie, as the statement completed McKenzie's thought, which began, "Well, if we had a union." (Tr 58, A 153 (Craig).) As such, Craig's statement clearly was not the product of a purely personal dispute.

The case cited by the Company, Scooba Mfg. Co. v. NLRB, 694 F.2d 82 (5th Cir. 1982) (per curiam), cert. denied, 466 U.S. 926 (1984), is easily distinguishable. There, an employee's angry proclamation to her supervisor that, "'It would be nice if it was a union here. A whole lot of things wouldn't be going on,"

was sparked by the employer's decision to discharge her son. 694 F.2d at 83-84. Moreover, the court emphasized that there was no evidence that the employee, unlike Craig, had engaged in other protected activity, that she was acting on behalf of others, or that she had engaged in any discussion of a union with other employees. Id.

3. Mary Craig's protected concerted activity was a motivating factor in her discharge

The record fully supports the Board's finding, (ALJD 6, A 33), that Mary Craig's protected concerted activity was a motivating factor in the Company's decision to terminate her employment. As described above, the Company does not contest, and therefore has effectively admitted the truth of, the Board's finding, (ALJD 5, A 32), that the Company was aware of Mary Craig's protected concerted activity concerning April Craig, Rigby, and Jackson.

The Board's finding, (ALJD 5, A 32), that the Company knew of Mary Craig's statement to McKenzie concerning unionization should be affirmed, as well. Thus, the ALJ, noting, (ALJD 5, A 32), that the Company did not call its Director of Nursing to deny hearing Craig's statement concerning unionization, specifically credited, (ALJD 5, A 32), Craig's testimony, (Tr 58, A 153), that she said, "[i]f we had a union they would not treat any of us this way," loudly enough for those standing at a

nearby nurses station, including the Director of Nursing, to hear. Cf. Gatliff Coal Co. v. NLRB, 953 F.2d 247, 252 (6th Cir. 1992) (accepting finding of unlawful motive based, in part, on "negative inferences" drawn from employer's failure to produce witnesses who should have been able to support employer's claim). The Board's finding, (ALJD 5, A 32), that the Director heard Craig's statement is also supported by her undisputed testimony that the Director looked up when Craig made that prounion statement. (Tr 57-58, A 152-153 (M. Craig).)

There is no merit in the Company's contention, (Br 18), that the Board erred in finding, (ALJD 5, A 32), that the Company was aware of Mary Craig's December 11 statement to McKenzie concerning unionization. The Company argues, (Br 18), that the Board improperly relied, (ALJD 3, A 30), on Craig's testimony, (Tr 57-58, A 152-153), that she spoke loudly enough for the Director of Nursing to hear that statement. The Company bases this argument on the First Circuit's decision in NLRB v. Pioneer Plastics Corp., 379 F.2d 301, cert. denied, 389 U.S. 929 (1967). That decision actually favors the Board in the present case.

Thus, in Pioneer Plastics, the First Circuit affirmed a Board finding that an employer knew about two employees' union activity and discharged them for that activity. 379 F.2d at 307. There was no direct evidence that the employer was aware

of the employees' union activity, but the employees testified that "supervisors were within hearing distance" when they spoke about the union. 379 F.2d at 306. The court did opine that "such conversations in and of themselves [were] not a sufficient basis to infer knowledge." Id. But the court nevertheless affirmed the Board's finding of employer knowledge because there was independent evidence indicating a strong likelihood that the employer was aware of the employees' union activity. Id.

The Board's finding here, (ALJD 5, A 32), that the Director of Nursing overheard Craig's statement concerning unionization was not based solely on Craig's testimony, (Tr 58, A 153), that she spoke loudly enough for the Director of Nursing to hear her comment. The Board also properly considered, (ALJD 5, A 32), the Company's failure to call the Director to testify and deny hearing Craig's statement. Cf. Gatliff Coal Co. v. NLRB, 953 F.2d 247, 252 (6th Cir. 1992) (accepting finding of unlawful motive based, in part, on "negative inferences" drawn from employer's failure to produce witnesses who should have been able to support employer's claim). The undisputed evidence also shows that the Director looked up when Craig made her statement. (Tr 57-58, A 152-153 (M. Craig).)

Moreover, the Company's argument ignores the fact that, just as there was additional evidence in Pioneer Plastics that the employer had knowledge of the employees' union activity,

there is here additional evidence that the Company knew Craig was engaging in protected concerted activity. Again, the Board's uncontested finding, (ALJD 5, A 32), is that, "[w]ithout question, [the Company] knew about the concerted nature of Mary Craig's activities with respect to April Craig, Rigby, and Jackson." Indeed, Dietary Manager Jeffers effectively told April Craig that she did not want Mary Craig to continue her protected activity on April Craig's behalf. (ALJD 5, A 32; Tr 98, A 193 (A. Craig).) Further, contrary to the Company's assumption, the Board relied on this additional evidence, as the Board concluded, (ALJD 6, A 33), that the Company discharged Mary Craig "because she engaged in protected concerted activity," without suggesting that this finding was based solely on the Company's reaction to Craig's statement to McKenzie regarding unionization.

The Company's related contention, (Br 18), that there was no evidence that the Director of Nursing repeated Mary Craig's statement concerning unionization is unavailing. It was entirely reasonable for the Board to infer that the Director of Nursing shared Craig's statement with the Company's management, including Dietary Manager Jeffers, given that Craig was discharged four days later based exclusively on Jeffers's recommendation. See generally NLRB v. Health Care Logistics, Inc., 784 F.2d 232, 236 (6th Cir. 1986) (circumstances may

support inference of knowledge); see also NLRB v. Lawson Printers, Inc. v. NLRB, 408 F.2d 1004, 1006 (6th Cir. 1969) (per curiam) (employer's sudden negative attitude toward employee who recently received favorable review and unsolicited wage increase supported inference of employer knowledge of protected activity).

The Board's further finding, (ALJD 6, A 33), that the Company's decision to discharge Mary Craig was motivated by her protected concerted activity is also well substantiated by the record. As the Board found, (ALJD 5, A 32), Craig "was an outstanding employee." In September 1997, Dietary Manager Jeffers promised Craig a 50 cents per hour wage increase. (ALJD 2, A 29; Tr 43-44, A 138-139 (M. Craig).) In October, Jeffers rated Craig "Outstanding," and recommended her continued employment. In particular, Jeffers stated that Craig was "Outstanding" in terms of her personality, dependability, initiative, and self improvement, and "Above Average" in the areas of cooperation, dependability, and quantity and quality of work. (ALJD 2, A 29; Tr 23, A 118 (Jeffers), GCX 5, A 64.)[6]

[6] The Company suggests, (Br 15-16), that the Board's finding that Mary Craig's protected activity was a motivating factor in her discharge is inconsistent with the fact that some of that activity preceded her October 1997 evaluation. On the contrary, that the Company initially tolerated Craig's protected activity did not require the Board to find that her ultimate discharge was unrelated to such activity. Cf. NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 66 (2d Cir. 1992) (employer's general

Craig's coworkers concurred, voting her "Employee of the Month" for October 1997. (Tr 26, A 121 (Jeffers), GCX 6, A 65.) Finally, the Company actually gave Craig a 25 cents per hour wage increase in early November, and assured Craig that the additional 25 cents per hour she was promised was erroneously omitted due to a payroll error and would be forthcoming. (ALJD 2, A 29; Tr 44-46, A 139-141 (M. Craig).)

By the middle of December, however, according to Administrator Cochran, Jeffers had accused Mary Craig of a variety of misconduct and recommended her dismissal. (ALJD 4, A 31; Tr 144-145, A 239-240 (Cochran).) This precipitous decline in Jeffers's opinion of Craig--coming on the heels of Craig's increasingly vocal call for better working conditions, including her December 11 statement to McKenzie concerning unionization--strongly suggests unlawful motivation. See, e.g., NLRB v. Health Care Logistics, Inc., 784 F.2d 232, 238 (6th Cir. 1986) (unlawful motive found where employee received pay raise, bonus,

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indifference to union activity did not preclude a finding that it discriminated against an employee on a particular occasion). This is particularly true here because the evidence is that Jeffers's resentment of Craig's activity intensified over time. Thus, while in the Spring of 1997 Jeffers merely admonished April Craig to resolve problems with her paychecks without Mary Craig's assistance, in December 1997 Jeffers threatened to fire Craig and whoever else was "making trouble" in the kitchen. Cf. W.F. Bolin Co. v. NLRB, 70 F.3d 863, 871 (6th Cir. 1995) (supervisor's threat--"If you guys keep complaining I'm going to fire the whole crew and bring in a whole new crew"--evinced hostility to protected activity).

and compliment from his supervisor three weeks prior to his discharge); Dayton Typographical Service, Inc. v. NLRB, 778 F.2d 1188, 1193 (6th Cir. 1985) (manager's statement that previously "valued" employee, who had made protected complaints, was discharged partly because of his "bad attitude" supported inference of unlawful motive); NLRB v. Allen's I.G.A. Foodliner, 651 F.2d 438, 440 (6th Cir. 1981) (unlawful motive found where employer did not find fault with nine-year employee's attitude until after protected activity in ninth year of employment).

The timing of Mary Craig's discharge in relation to her protected activity is equally revealing of the Company's unlawful motive. See NLRB v. Aquatech, Inc., 926 F.2d 538, 546 (6th Cir. 1991) (Board may infer unlawful motivation from fact that discharge came shortly after employee's protected activity); JMC Transport, Inc. v. NLRB, 776 F.2d 612, 620 (6th Cir. 1985) (same). By December 11, 1997, Craig's protected activity had progressed from discussing wage issues with her coworkers, and bringing their concerns to management's attention, to openly expressing her view that the Company would treat all of its employees better if they had a union. (ALJD 5, A 32; Tr 55, 58, A 150, 153 (M. Craig).) The Company terminated Craig's employment on December 15, four days later. See NLRB v. Evans Packing Co., 463 F.2d 193, 195 (6th Cir. 1972) (finding

unlawful motivation where employer fired employee eight days after he voiced employees' demand for daily overtime pay).

Finally, the Board's finding of unlawful motivation is confirmed by the Company's disparate treatment of Craig. See NLRB v. Aquatech, Inc., 926 F.2d 538, 547 (6th Cir. 1991) ("discriminatory application . . . of policies may indicate that employees are being singled out for union activities"). Thus, as Administrator Cochran conceded, (ALJD 4, A 31; Tr 121, 123-124, A 216, 218-219), unlike Mary Craig, two employees who had been discharged--one because she had been "rude" to residents' family members and the subject of complaints from her coworkers--were given prior warnings or reprimands. See Tel Data Corp. v. NLRB, 90 F.3d 1195, 1198 & n.3 (6th Cir. 1996) (unlawful motive found where, unlike discharged employee, others guilty of similar offenses were given warnings); NLRB v. Comgeneral Corp., 684 F.2d 367, 370 (6th Cir. 1982) (unlawful motive supported by evidence that, in deviation from past practice, employees were discharged without prior notice of misconduct).

C. The Company Failed to Prove that It Would Have Discharged Mary Craig Even in the Absence of Her Protected Activity

The Board reasonably found, (ALJD 6, A 33), that the Company failed to prove that it would have discharged Mary Craig

even in the absence of her protected activity.[7] The Company claims, (Br 24-25), that Craig would have been discharged for leaving the November 11 meeting in Administrator Cochran's office; arguing with Dietary Manager Jeffers on December 10; not getting along with employee Monson; and crying, talking loudly, and banging pots and pans in the kitchen. The Company relies, (Br 25), on Cochran's testimony that she discharged Mary Craig based solely on Jeffers's recommendation and on what she claims Jeffers told her on the morning of December 15, 1997:

> That Mary Craig . . . was not getting along with her co-worker, and that there . . . were several disruptions within the workplace, such as crying . . . talking very loudly or shouting . . . banging pots and pans around . . . and that was disruptive to the workplace and to the home itself.

(ALJD 4, A 31; Tr 144, A 239 (Cochran).) As the Board found, (ALJD 6, A 33), the Company's claim cannot withstand scrutiny.

To begin, the Company's claim that it was motivated by the November 11 or December 10 incidents is simply not credible. As the Board observed, (ALJD 5, A 32; Tr 143-144, A 238-239 (Cochran)), neither Cochran nor Jeffers, the only company representatives who testified, mentioned the November 11 or

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[7] Significantly, as with any affirmative defense, the Company's burden is one of persuasion; that is, the Company was required to prove by a preponderance of the evidence that it actually would have discharged Mary Craig for a nondiscriminatory reason. See Arrow Electric Co. v. NLRB, 155 F.3d 762, 766 & n.5 (6th Cir. 1998); Hyatt Corp. v. NLRB, 939 F.2d 361, 374 (6th Cir. 1991).

December 10 incidents in testifying about the reasons Jeffers allegedly gave--and the ones Cochran allegedly relied on--for discharging Mary Craig. Indeed, Cochran specifically testified, (Tr 140, A 235 (Cochran)), that there were no reasons for Craig's discharge other than the ones she claimed Jeffers gave her on December 15. In fact, it appears that the Company raised the November 11 and December 10 incidents as additional reasons for Craig's discharge for the first time after the hearing in its post-hearing briefs. (Br 24-25, Post-hearing Brief of Main Street Terrace Care Center 5 n.1.)

Moreover, the Company had not disciplined Craig for either of those incidents prior to terminating her employment. Indeed, as the Company concedes, (Br 5), it never disciplined Craig or gave her any warnings for any of her alleged misconduct prior to summarily discharging her on December 15. (ALJD 5, A 32; Tr 131-132, A 226-227 (Cochran).) See NLRB v. Health Care Logistics, Inc., 784 F.2d 232, 238 (6th Cir. 1986) (employer failed to show employee would have been discharged for poor work performance where employer never warned employee about alleged deficiencies in his work); Dayton Typographical Service, Inc. v. NLRB, 778 F.2d 1188, 1193 (6th Cir. 1985) (rejecting claim that employee would have been discharged for his "bad attitude toward work and co-workers" where employer never warned or disciplined employee for his alleged attitude problem). Further, as the

Board noted, (ALJD 6, A 33), and the Company admitted, (Tr 131, A 226 (Cochran)), prior to December 15, it had not even investigated any of Craig's alleged misconduct. See Handicabs, Inc. v. NLRB, 95 F.3d 681, 685 (8th Cir. 1996) (employer's failure to investigate employee's alleged misconduct supported Board's rejection of claim that employee was fired for that misconduct), cert. denied, 521 U.S. 1118 (1997).

The Company's claim is further undermined by the fact that it obviously knew about all of Mary Craig's alleged misconduct well before her discharge. See, e.g., NLRB v. Aquatech, Inc., 926 F.2d 538, 546 (6th Cir. 1991) (rejecting claim that two employees would have been discharged for absenteeism where discharges occurred several weeks after their last violations of attendance policy). Thus, the Company knew about the November 11 and December 10 incidents when they occurred. The Company's assertion, (Br 7-8), that Craig was discharged the "next time" she reported for work following her December 10 argument with Jeffers must be rejected. The ALJ specifically credited, (ALJD 5, A 32), Craig's testimony, (Tr 63, A 158), that she worked "two or three" days after this incident.

Similarly, with regard to the reasons actually given by Cochran for discharging Craig--her inability to get along with Monson, crying, talking loudly, and banging pots and pans--the Company knew about this conduct as well long before December 15.

(ALJD 2, 4, A 29, 31; Tr 50-52, 149, A 145-147, 244 (Craig), Tr 122, A 217 (Cochran).) That the Company knew about the conduct specifically cited by Cochran as the basis for Mary Craig's discharge underscores the reasonableness of the Board's finding, (ALJD 6, A 33), that, "when examined in light of the record made herein, [such conduct] would not justify terminating someone."

Thus, the Company knew about Craig's difficulties with Monson since at least the November 11 meeting, yet it did not discipline or warn Craig, or even tell her that she was doing anything unsatisfactory. (Tr 50-51, A 145-146 (Craig).) Indeed, as the Board found, (ALJD 5-6, A 32-33), Craig's inability to get along with Monson was not unique, as other employees, namely Rigby and April Craig, also had problems with Monson. (ALJD 3, A 30; Tr 94, A 189 (Rigby), Tr 99-100, A 194-195 (A. Craig).) In fact, contrary to the Company's claim, (Br 24), that it was unaware that Monson was the source of problems in the kitchen, Cochran admitted, (ALJD 6, A 33; Tr 128, A 223), that at some point after the November 11 meeting she discussed with Jeffers Monson's inability to get along with other employees.

The Company's reliance, (Br 24-25), on its claim that it discharged Mary Craig for crying, talking loudly, and banging pots and pans similarly fails to withstand scrutiny. Thus, Craig cried at work once--in October or November--over losing

her husband's $300 pair of glasses. (ALJD 4, A 31; Tr 51, A 146 (Craig), Tr 122, A 217 (Cochran).) Craig's banging of pots and pans in the kitchen was nothing new, as they formed a suction when placed inside one another and sometimes "flew" apart upon being separated. (ALJD 4, A 31; Tr 51-52, A 146-147 (M. Craig), Tr 122, A 217 (Cochran).) Finally, Craig explained, (Tr 149, A 244), that, while she talks loudly, she spoke no more loudly in December than she had in September, prior to her outstanding evaluation.

Finally, the Company asserts, (Br 21-22), that Mary Craig was an at-will employee, and that the Company was not required to give a reason for her discharge. The Board does not here dispute these assertions. In fact, the Board expressly noted, (D&O 1 n.1, A 28), that the ALJ did not rely on the Company's at-will employment policy or its failure to give a contemporaneous justification for Craig's discharge in finding, (ALJD 6, A 33), that the discharge was motivated by her protected activity.

In sum, of the six reasons provided by the Company for Mary Craig's discharge, Cochran, who discharged Craig, cited only four when she explained the discharge at the hearing; the Company never disciplined Craig for any of her alleged misconduct, even though the Company was aware of all of it well before her discharge; and no evidence supports the Company's

claim that it would have discharged Craig for the reasons Jeffers allegedly gave Cochran on December 15. Thus, the Board was fully justified in finding, (ALJD 6, A 33), that Mary Craig's protected activity was a motivating factor in the Company's decision to terminate her employment, and that her discharge violated Section 8(a)(1) of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that this Court should enter a judgment enforcing the Board's order in full and denying the Company's cross-petition for review.

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

I hereby certify that the Brief for the National Labor Relations Board complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7), as it contains 9,914 words, using Microsoft Word 97.

_____
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